Ketua Pengarah Kesatuan Sekerja, Malaysia v Evergreen Laurel Hotel (M) Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-01–88 OF 2003 AND NO P-02–1044 OF 2003
LOW HOP BING, RAMLY ALI AND T SELVENTHIRANATHAN JJCA
31 MARCH 2010

Labour Law — Trade union — Recognition — Claim for — Decision of Director General of Trade Unions ('DGTU') to adopt verification method to carry out membership check — Whether DGTU's decision amenable to judicial review — Whether hotel's application to quash DGTU's decision premature — Whether DGTU's preference to carry out membership check by way of verification within ambit and purview of law

On 14 December 1999, the National Union of Hotel, Bar and Restaurant Employees ('the Union') applied for recognition from the Director General of Trade Unions ('the DGTU'), pursuant to s 9 of the Industrial Relations Act 1967 ('the Act'), to represent the workers of the Evergreen Laurel Hotel (M) Sdn Bhd ('the hotel'). The hotel applied to the Director General of Industrial Relations ('DGIR') for a competency check to be carried out to ascertain whether the Union was competent to represent the hotel's employees. A competency check was accordingly carried out and it confirmed that the Union was competent to represent the hotel's employees. On 10 November 2000, the DGIR duly informed the hotel of the outcome of the competency check. The hotel then applied to the DGIR for the membership to be carried out by way of secret ballot. The DGIR requested the DGTU to carry out a membership check to ascertain the membership status of the Union as at 14 December 1999, when the Union claimed for recognition. The DGTU decided on the membership check by the verification method instead of the secret ballot which the hotel requested. The hotel then appealed to the DGTU to reconsider his decision but the latter rejected the hotel's appeal. The hotel then proceeded to apply for judicial review of the DGTU's decision wherein it applied for an order of certiorari to quash the DGTU's decision that the membership check be done by the verification method and an order of mandamus directing the DGTU to use the secret ballot instead. The High Court granted the orders of certiorari and mandamus and hence these appeals by the DGTU and the Union. The DGTU submitted that the hotel's application to quash its decision was premature because the acts of the DGTU were merely administrative as set out in s 9 of the Act. The Union adopted the views of the DGTU. The hotel contended that the decision of the DGTU as to the method of the membership check to be adopted was an

official decision that was amenable to judicial review. The issues to be considered in this appeal were whether or not the hotel's application to quash the DGTU's decision was premature; and whether the DGTU's preference to carry out the membership check by way of verification was within the ambit and purview of the law.

Held, allowing the appeals with costs:

(1) Section 9(1)–(4C) of the Act prescribes the procedure, process and practice to be adopted by the DGIR and the DGTU in considering a trade union's application for recognition. It was not every act carried out by the statutory authority that was subject to judicial review. Such an act must go beyond what was merely an administrative or procedural act. Our courts had made it abundantly clear that the decision as to whether to accord recognition lies singularly with the Minister under s 9(5) of the Act and that the act of the DGTU, on membership check, was only an administrative act towards the final decision of the Minister under s 9(5). Thus in the instant appeal, the DGTU's act to adopt one mode of membership check ie the verification method in preference to another was merely an administrative or procedural act, which was merely part and parcel of the procedure for recognition, and not subject to judicial review. As such the hotel's application before the High Court was premature and was against public policy, being against the intent and spirit of the Act. The hotel ought to have proceeded under s 9(5) of the Act and waited for the Minister to make a decision thereon as only the Minister's decision is judicially reviewable (see paras 17, 21 & 23–26).

(2) When the Trade Unions Act 1959 and the Trade Unions Regulations 1959 gave the DGTU the discretion to choose between two modes of membership checks, it was not for the hotel or the High Court to decide on the particular mode the DGTU should adopt. The interference by the court was only justified if the DGTU went beyond the scope of his duties or had failed to act in good faith according to established procedure having regard to the circumstances of the particular case. In the present case, the DGTU preferred to carry out the membership check using the verification method as it was a fair and just mode and more practical. As the discretion had been exercised within the parameters of the enabling provisions, and in good faith, the court should not usurp the functions of the DGTU by substituting its own decision for that of the DGTU (see paras 29–31).

[Bahasa Malaysia summary

Pada 14 Disember 1999, Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran ('Kesatuan') memohon pengiktirafan daripada Ketua Pengarah Kesatuan Sekerja ('KPKS'), berikutan s 9 Akta Perhubungan Perusahaan

1967 ('Akta') untuk mewakili pekerja-pekerja Evergreen Laurel Hotel (M) Sdn Bhd ('hotel'). Hotel tersebut memohon kepada Ketua Pengarah Perhubungan Perusahaan ('KPPP') agar satu pemeriksaan kelayakan dijalankan untuk memastikan sama ada Kesatuan berkelayakan untuk mewakili pekerja-pekerja hotel. Satu pemeriksaan kelayakan dijalankan dan ia mengesahkan bahawa Kesatuan berkelayakan mewakili pekerja-pekerja hotel. Pada 10 November 2000, KPPP telah memaklumkan kepada hotel hasil pemeriksaan kelayakan. Hotel kemudiannya memohon kepada KPPP agar keahlian dipilih secara pengundian rahsia. KPPP meminta KPKS menjalankan pemeriksaan keahlian untuk memastikan status ahli Kesatuan setakat 14 Disember 1999, di mana Kesatuan telah memohon pengiktirafan. KPKS memutuskan pemeriksaan kesatuan melalui kaedah penentusahan dan bukan secara undian rahsia seperti yang diminta oleh hotel. Hotel kemudiannya merayu kepada kepada KPKS untuk mempertimbangkan semula keputusannya tetapi KPKS menolak rayuan hotel. Hotel tersebut memohon semakan kehakiman terhadap keputusan KPKS di mana ia memohon satu perintah certiorari untuk membatalkan keputusan KPKS bahawa keahlian diperiksa mengikut kaedah penentusahan dan memohon perintah mandamus mengarahkan KPKS untuk sebaliknya menggunakan undian. Mahkamah Tinggi membenarkan perintah-perintah certiorari dan mandamus dan ini adalah rayuan oleh KPKS dan Kesatuan. KPKS menghujahkan bahawa permohonan hotel untuk membatalkan keputusannya adalah pra-matang kerana tindakan KPKS hanyalah satu pentadbiran di bawah s 9 Akta. Kesatuan bersetuju dengan pandangan KPKS. Hotel menghujahkan bahawa keputusan KPKS iaitu kaedah pemeriksaan keahlian yang sepatutnya digunakan adalah keputusan rasmi yang boleh dipinda oleh semakan kehakiman. Isu-isu yang perlu dipertimbangkan dalam rayuan ini adalah sama ada permohonan hotel untuk membatalkan keputusan KPKS adalah pra-matang; dan sama ada pilihan KPKS untuk menjalankan pemeriksaan keahlian secara penentusahan adalah dalam lingkungan dan skop undang-undang.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Seksyen 9(1)–(4C) Akta menetapkan prosedur, proses dan amalan yang harus digunakan oleh KPPP dan KPKS dalam mempertimbangkan satu permohonan oleh kesatuan sekerja untuk pengiktirafan. Bukan semua tindakan yang dijalankan oleh pihak berkuasa statutori tertakluk kepada semakan kehakiman. Tindakan itu mesti melangkaui sesuatu yang yang hanya merupakan tindakan pentadbiran atau prosedur. Mahkamah jelas menunjukkan bahawa keputusan terhadap sama ada untuk memberi pengiktirafan bersandarkan semata-mata kepada Menteri di bawah s 9(5) Akta dan bahawa tindakan KPKS, berkenaan pemeriksaan keahlian, hanyalah satu tindakan pentadbiran terhadap keputusan akhir Menteri di bawah s 9(5). Oleh itu, di dalam rayuan ini,

tindakan KPKS untuk menggunapakai satu cara pemeriksaan keahlian iaitu kaedah penentusahan sebagai pilihan berbanding yang satu lagi, hanyalah tindakan pentadbiran atau prosedur, iaitu kelaziman bagi prosedur untuk pengiktirafan, dan tidak tertakluk kepada semakan kehakiman. Oleh itu, permohonan hotel ke Mahkamah Tinggi adalah pra-matang dan bertentangan dengan polisi awam kerana bertentangan dengan niat Akta. Hotel seharusnya mematuhi s 9(5) Akta dan menunggu Menteri membuat keputusan kerana hanya keputusan Menteri yang boleh dibuat semakan kehakiman (lihat perenggan 17, 21 & 23–26).

(2) Apabila Akta Kesatuan Sekerja 1959 dan Peraturan-peraturan Kesatuan Sekerja 1959 memberi KPKS kuasa budi bicara untuk memilih antara dua cara pemeriksaan keahlian, ia bukanlah bagi hotel atau Mahkamah Tinggi untuk memutuskan cara yang patut digunapakai oleh KPKS. Campur tangan oleh mahkamah cuma dibenarkan jika KPKS melangkaui skop tugasnya atau gagal bertindak secara sucihati berdasarkan prosedur yang digariskan, bergantung pada hal keadaan sesuatu kes. Dalam kes ini, KPKS memilih untuk menjalankan pemeriksaan keahlian menggunakan kaedah penentusahan kerana ia adalah cara yang adil dan lebih praktikal. Berkenaan kuasa budi bicara yang dijalankan dalam sempadan yang dibenarkan Akta, dan secara sucihati, mahkamah tidak seharusnya mengambil alih fungsi KPKS dengan menggantikan keputusan KPKS dengan keputusannya (lihat perenggan 29–31).]

Notes

For cases on recognition, see 8 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1741–1763.

Cases referred to

Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 6 MLJ 446; [2007] 6 AMR 384, HC (not folld)

Electrical Industry Workers Union v Registrar of Trade Unions & Anor [1976] 1 MLJ 177, FC (refd)

Electrical Industry Workers Union, The v The Honourable Minister of Labour & Power & The Registrar of Trade Unions MTKL Motion No A11 of 1981, HC (refd)

Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors [2005] 7 MLJ 132, HC (refd)

Kennesion Brothers Sdn Bhd v Construction Workers Union [1989] 2 MLJ 421, SC (refd)

National Union of Employees in Companies Manufacturing Rubber Products v Director General for Industrial Relations & Anor [1990] 3 MLJ 112, HC (refd)
National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja [2000] 3 MLJ 689, FC (refd)
R v Sloan [1990] 1 NZLR 474 (refd)
Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh and Tenaga Rakyat & Anor; Non-Metallic Mineral Products Manufacturing Employees Union (Intervener) [241] MD 8, HC (refd)
Thomas v Attorney-General [1937] Ch 72, Ch D (refd)

Legislation referred to

Industrial Relations Act 1967 s 9, 9(1), (1A), (1B), (1C), (1D), (2), (3), (3A), (4), (4A), (4B), (4C), (5)
Rules of the High Court 1980 O 53, O 53 r 3
Trade Unions Act 1959 s 26(3)
Trade Unions Regulations 1959 reg 65

Appeal from: Application for Judicial Review No 25–46 of 2001 (High Court, Pulau Pinang)

Azizah bt Nawawi (K Kumarathiraviam with her (Shan & Gooi)) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
TF Leow (TF Leow & Associates) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] These two appeals before us were brought respectively by the Director General of Trade Unions ('the DGTU') and the National Union of Hotel, Bar and Restaurant Employees ('the Union') against the decision of the learned judicial commissioner who had, pursuant to the application of Evergreen Laurel Hotel (M) Sdn Bhd ('the hotel'), granted an order of certiorari to quash the DGTU's decision that the membership check be done by the 'verification method'; and an order of mandamus directing the DGTU to use the 'secret ballot' instead.

FACTUAL BACKGROUND

[2] By letter dated 14 December 1999, the Union applied for recognition from the DGTU based on the provisions of the Industrial Relations Act 1967.

A **[3]** On 3 February 2000, the hotel applied by letter to the Director General of Industrial Relations ('DGIR') for a competency check to ascertain the issue of the union's competence to represent the hotel's employees.

B **[4]** In response to the letter dated 14 March 2000 from the DGIR, a competency check was carried out on 9 May 2000. It confirmed that the Union was competent to represent the hotel's employees. In the letter dated 1 November 2000, the DGIR informed the hotel of the outcome of the competency check.

C **[5]** Vide letter dated 10 November 2000, the hotel applied to the DGIR for the membership check to be carried out by way of 'secret ballot'.

D **[6]** By letter dated 14 February 2001, the DGIR requested the DGTU to carry out a membership check to ascertain the membership status of the Union on the date of the Union's claim for recognition on 14 December 1999. Because of incomplete documentation, the hotel was required to furnish the particulars of its employees in a new 'Form B', with which the hotel complied on 16 May 2001.

E **[7]** Vide letter dated 7 June 2001, the DGTU decided on the membership check by the 'verification method' instead of the 'secret ballot' which the hotel requested.

F **[8]** In the letter dated 16 June 2001, the hotel appealed to the DGTU to reconsider his decision. After considering the hotel's appeal and the Union's objection, the DGTU vide letter dated 3 August 2001 rejected the hotel's appeal.

G **[9]** The DGTU proceeded with the 'verification method' and informed the hotel of the result vide letter dated 19 November 2001.

H **[10]** Upon the hotel's application for judicial review, the above orders of certiorari and mandamus were granted by the High Court.

[11] On 30 November 2009, we heard and allowed these appeals by the DGTU and the Union. We now provide our grounds.

I PREMATURE APPLICATION

[12] Learned senior federal counsel Datin Azizah bt Haji Nawawi submitted for the DGTU that the hotel's application to quash the decision of the DGTU is premature because the acts of the DGTU are merely

administrative acts as set out in s 9 of the Industrial Relations Act 1967 (a reference hereinafter to a section is a reference to that section in the Industrial Relations Act 1967, unless otherwise stated). Mr K Kumarathiraviam, of counsel for the Union, associated himself with the views taken for the DGTU.

[13] Learned counsel Mr MF Leow contended for the hotel that the DGTU had clearly made an official decision (on the method of the membership check to be carried out) which is amenable to judicial review. He relied on *Clear Water Sanctuary Golf Management Bhd v Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 6 MLJ 446; [2007] 6 AMR 384 (HC).

[14] In considering this issue of whether or not the hotel's application to quash the DGTU's decision is premature, we find it necessary and advisable to discuss *Clear Water Sanctuary Golf Management Bhd*, cited for the hotel. It concerns the threshold stage at which an ex parte application was filed by the applicant for leave to obtain an order for judicial review under O 53 r 3 of the Rules of the High Court 1980. There, the issue was whether such leave should be granted. In granting leave, VT Singham J explained, inter alia, that all the applicant has to show is a prima facie case and that the application is not frivolous or vexatious (p 395 lines 25–30). In essence, that was the ratio in *Clear Water Sanctuary Gold Management Bhd*.

[15] On the other hand, the instant appeal has gone through the threshold stage in the High Court and leave had already been granted. Thereafter, the focus is on the substantive motion which deals exclusively with the grant or refusal of the orders of certiorari and mandamus. Hence, *Clear Water Sanctuary Gold Management Bhd*, at the leave stage, is certainly unhelpful to the hotel herein.

[16] Before us, a proper perspective may be had by a careful reading of the entire scheme for the 'Recognition and Scope of Representation of Trade Unions' contained in s 9 which reads:

PART III

RECOGNITION AND SCOPE OF REPRESENTATION OF TRADE UNIONS

9 Claim for recognition

(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say —

(a) managerial capacity;

A (b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of B workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by C a trade union of employers.

(1B) The Director General, upon receipt of a reference under subsection (1A), may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

D (1C) Where the matter is not resolved under subsection (1B) the Director General shall notify the Minister.

(1D) Upon receipt of the notification under subsection (1C), the Minister shall give his decision as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity and communicate E in writing the decision to the trade union of workmen, to the employer and to the trade union of employers concerned.

(2) Subject to subsection (1), a trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of F employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim —

G (a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition.

(c) (Deleted)

H (3A) Upon according recognition to the trade union of workmen concerned under paragraph (3)(a), the employer or the trade union of employers concerned shall notify the Director General.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers I concerned fails to comply with subsection (3), the trade union of workmen may, within fourteen days —

(a) of the receipt of the notification; or

(b) after the twenty-one day period in subsection (3) has lapsed,

report the matter in writing to the Director General, failing which the claim for recognition shall be deemed to have been withdrawn.

(4A)Upon receipt of a report under subsection (4), the Director General may take such steps or make such enquiries to ascertain —

(a) the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom the recognition is sought to be accorded; and

(b) by way of secret ballot, the percentage of the workmen or class of workmen, in respect of whom recognition is being sought, who are members of the trade union of workmen making the claim.

(4B)For the purpose of carrying out his functions under subsection (1B) or (4A) the Director General —

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant within the period specified in the requirement;

(b) may refer to the Director General of Trade Unions for him to ascertain the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions; and

(c) may enter any place of employment where any workmen in respect of whom a claim for recognition is sought to be accorded are being employed to examine any records or documents or to conduct secret ballot.

(4C)Upon ascertaining the matter under subsection (4A), the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify.

(6) A decision of the Minister under subsection (1D) or (5) shall be final and shall not be questioned in any court.

[17] In our view, s 9 comprehensively deals with the 'Recognition and Scope of Representation of Trade Unions'. It is pertinent to point out that s 9(1)–(4C) prescribe the procedure, process and practice (collectively, 'the procedure') to be adopted by the DGIR and the DGTU in considering a trade union's application for recognition. However, the power to accord

recognition can only be made by the Minister under s 9(5). Our view is reinforced by a number of judicial pronouncements on the procedure established under s 9.

[18] A recognition issue was considered in *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* [2000] 3 MLJ 689 (FC) at p 695F-G. The Federal Court cited with approval the judicial statement made by Siti Norma Yaakob JCA (later Chief Judge (Malaya)) in this court that 's 9 in particular refers to 'Claim for Recognition' and from a perusal of its many subsections, it is clear that what that section seeks to do is to set out the procedure by which a trade union can successfully initiate the process of seeking recognition to represent the workers of a potential employer'.

[19] Another recognition issue under s 9 arose in *National Union of Employees in Companies Manufacturing Rubber Products v Director General for Industrial Relations & Anor* [1990] 3 MLJ 112 (HC). At p 113I–114B, Wan Adnan J (later PCA) said:

> In my view, the director general is not supposed to make a decision on the matter. He cannot decide whether or not to accord recognition. The power to accord recognition is only given to the employer under s 9(3)(a) or the Minister under s 9(5). The most the director general can do to resolve the matter under sub-s (4A) is (after exercising his power under sub-s (4B)) to advise the employer to accord recognition. If the advice is accepted and recognition is accorded the matter is resolved under sub-s (4A). Otherwise the matter is nor resolved and has to be referred to the Minister for his decision.

[20] The function of the DGTU in relation to the recognition issue was considered in *Kennesion Brothers Sdn Bhd v Construction Workers Union* [1989] 2 MLJ 421 (SC). At p 421C-E Mohamed Azmi SCJ (as he then was) said:

> Where a dispute arises under s 9(1A) or s 9(3)(c), the director general is empowered under s 9(4B)(b) to refer the matter to the registrar for his decision not only on the question of whether the workman in respect of whom recognition is being sought are members of the trade union, but also on any question of competency of the trade union concerned to represent any workman or class of workman in respect of whom recognition is sought to be accorded. It is only when the dispute cannot be resolved by the director general that the matter is referred to the Minister for his final decision under s 9(5).

[21] Our courts have made it abundantly clear that the decision as to whether to accord recognition lies singularly with the Minister under s 9(5).

The act of the DGTU on membership check, being part of the procedure for recognition, is only an administrative act towards the final decision of the Minister under s 9(5).

[22] In *Syarikat Emerald Tiles Sdn Bhd v Menteri Buruh and Tenaga Rakyat & Anor; Non-Metallic Mineral Products Manufacturing Employees Union (Intervener)* [241] MD 8 (HC), Siti Norma Yaakob J (later Chief Judge (Malaya)) held that when the DGTU was conducting the membership check, he was merely performing an administrative act and that when the recognition issue could not be resolved, that issue was referred to the Minister for decision on whether to award recognition under s 9(5). It was only after the Minister's decision that the applicant could seek to quash it by certiorari.

[23] It is not every act carried out under statutory authority that is subject to review. Such an act must go beyond what is merely an administrative or procedural act: per Hardy Boys J in *R v Sloan* [1990] 1 NZLR 474 at p 479 lines 10–20.

[24] In the context of the instant appeal, the DGTU's act, to adopt one mode of membership check ie the 'verification method' in preference to the method by way of 'secret ballot', is merely an administrative or procedural act which is not subject to judicial review. The DGTU's act is merely part and parcel of the procedure for recognition. That being the position, the DGTU's act is not subject to judicial review. Only the Minister's decision is judicially reviewable.

[25] The hotel's application filed in the High Court before a decision was made by the Minister under s 9(5) is clearly against the intent and spirit of the Industrial Relations Act 1967; and hence against public policy. The hotel ought to have proceeded under s 9(5) and waited for the Minister to make a decision thereon. It is only thereafter that the hotel may seek judicial review under O 53: see *Kaneka Paste Polymers Sdn Bhd v Director General of Industrial Relations & Ors* [2005] 7 MLJ 132.

[26] In the circumstances, we hold that the hotel's application before the High Court was premature.

WAS DGTU ACTING WITHIN THE LAW?

[27] Both the DGTU and the Union took the position that the DGTU's preference to carry out the membership check by way of verification is within the ambit and purview of the law, while the hotel's contention is to the contrary.

[28] In this regard, we shall first refer to s 26(3) of the Trade Unions Act 1959 which reads as follows:

> (3) Where a trade union of workmen has served a claim for recognition under the Industrial Relations Act 1967 [Act 177], the Director General may, at the request of the Director General for Industrial Relations, carry out a membership check in such manner as may be prescribed by regulations in order to ascertain the percentage of workmen or any class of workmen, in respect of whom recognition is being sought, who are members of the union making the claim.

[29] Section 26(3) confers on the DGTU the discretion to carry out the membership check in such manner as may be prescribed by regulations. Regulation 65 of the Trade Unions Regulations 1959 made under the Trade Unions Act 1959 provides for the formula to ascertain the percentage of membership, and to exercise the discretion on how to conduct a membership check, either by 'membership verification' or by 'secret ballot'.

[30] The DGTU preferred to carry out the membership check by way of verification on the following grounds:

(a) membership check by verification is a fair and just mode and more practical to ascertain the status of the employees at the date of application for recognition (date of claim); and

(b) by applying the verification process, the DGTU can ensure that all hotel employees who were members of the Union at the date of the claim would be taken into consideration in order to ascertain the percentage of Union membership among the employees of the hotel at the date of claim.

[31] When the Trade Unions Act 1959 and the Trade Unions Regulations 1959 give the DGTU the discretion to choose between two modes of membership checks, it is not for the hotel or the High Court to decide on the particular mode the DGTU should adopt. The interference by the court, if at all, is only justified if the DGTU went beyond the scope of his duties by adopting a mode which is not specified or permitted by the Act, read with the Regulations, or has failed to act in good faith according to established procedure having regard to the circumstances of this particular case. Subject to these exceptions, the discretion is unfettered and belongs to the DGTU. Where, as in the instant appeal, the discretion has been exercised within the parameters of the enabling provisions, and in good faith, the court should not usurp the functions of the DGTU by substituting its own decision for that of the DGTU. The court must bear in mind that the function of the court in this category of cases is by way of judicial review only.

[32] Our view is fortified by the judgment of the Federal Court in *Electrical Industry Workers Union v Registrar of Trade Unions & Anor* [1976] 1 MLJ 177 (FC). There, the issue was whether it was the Union or the registrar of Trade Unions (now the DGTU) who should decide whether the workers fell within the scope of the Union. Lee Hun Hoe Chief Judge (Borneo) (as he then was) held at p 179A-D:

> Whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the registrar of Trade Unions. If a particular union can say it is for the Union to decide whether those in another industry might be absorbed as members of the Union, a dangerous situation would develop whereby each and every union in the country would do the same. This could produce disastrous result for the country. It is for the Union to satisfy the registrar of Trade Unions that the Monsanto Electronics Workers Union belongs to the same or similar industry as the Union. What is sought by the originating summons is a declaratory judgment as to the functions and powers of the registrar of Trade Unions. I think the court must decline to exercise its discretion in making any declaration which would fetter the registrar in the exercise of his duties imposed on him by the Ordinance. It would seem that if the registrar of Trade Unions acted in good faith in the performance of his duties he would be protected by s 6 of the said Ordinance.

[33] At p 181I, Ong Hock Sim FCJ (as he then was) expressed a similar view, ie the court should not define and draw up guidelines for the registrar as to his functions under the Ordinance and the manner he is to carry them out. His Lordship cited with approval the judgment of Farwell J in *Thomas v Attorney-General* [1937] Ch 72 at pp 75–78 to the effect that where the relevant Act gave the discretion to the attorney general to decide on the steps to be taken, the court ought not in a case of this kind to make an order which would or might have the effect of fettering the discretion vested in the attorney general.

[34] Another supportive view was expressed by the Federal Court through the judgment of Abdul Malek Ahmad FCJ (later PCA) in *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja*, at pp 697–698. His Lordship cited with approval an unreported High Court decision in *The Electrical Industry Workers Union v The Honourable Minister of Labour & Power & The Registrar of Trade Unions* (MTKL Motion No A11 of 1981) where Hashim Yeop Sani J (later Chief Judge (Malaya)) opined that the whole function of certiorari is aimed at the examination of the record and that, in a certiorari proceeding, the court is acting as a supervisory court and not as an appellate court and that 'it is clear that the Legislature has entrusted on the registrar and the Minister the discretion to decide on the membership and representation by the union and the courts should not usurp this function

and embark on a rehearing of the matter'.

CONCLUSION

[35] On the grounds given above, we allowed these appeals, set aside the order of the court below and substituted it with an order that the hotel's application be dismissed with costs of RM15,000, here and below, to each of the appellants, to whom the respective deposits are also to be refunded.

Appeals allowed with costs.

Reported by Kohila Nesan